# APPENDIX

# APPENDICES

## APPENDIX A

### Opinions Below

**Opinion of McLaughlin, J., in Landell, et al. v. Northern Pac. Ry. Co., United States District Court for the District of Columbia, March 9, 1951 (98 F. Supp. 479).**

The plaintiffs are minority holders of shares of stock in the Northern Pacific Railroad Company, a Federal Corporation, organized and existing under the Act of July 2, 1864 (13 Stat. 365), the owners of which stock refused to join in the reorganization of said company in 1896 growing out of foreclosure proceedings before the United States Circuit Court for the Eastern District of Wisconsin. The defendant became the holder, in said reorganization proceedings, of more than ninety per cent of the stock of the old company. In this action the plaintiffs as such minority stockholders pray that the decrees of the Federal Court of Wisconsin in the above mentioned foreclosure proceedings be adjudged and decreed to be null and void and the title to the franchises, railroad and right of way granted to the Northern Pacific Railroad Company under the aforementioned Act of July 2, 1864 and the Joint Resolution of May 31, 1870 (16 Stat. 378) be decreed to be in the Northern Pacific Railroad Company and
340 that the Northern Pacific Railway Company be adjudged and decreed to have no right, title or interest in or to the franchise, railroad and right of way so granted to Northern Pacific Railroad Company except as the holder of the majority of the capital stock and the bonds of said federal corporation. In addition plaintiffs pray for an accounting with defendant and further pray that all property, profits, benefits and advantages belonging to Northern Pacific Railroad Company or arising or accruing from its property and rights received, acquired or claimed by defendant, or any of its subsidiaries or

agents pursuant to the aforementioned decrees or orders of the Federal Court of Wisconsin be ratably distributed among all the shareholders of Northern Pacific Railroad Company in proportion to the holdings of such shareholders in said Railroad Company.

Defendant moves to dismiss (1) for improper venue, (2) for lack of an indispensable party to the action, to wit Northern Pacific Railroad Company, and (3) for lack of service.

In support of its motion to dismiss for improper venue defendant contends that the action is local since the principal question involved in the case is the title to land and that actions of a local nature must be brought where the property involved, or some part thereof is located.

The principle announced in Massie v. Watts, 6 Cranch (10 U.S.) 148 appears to apply in the circumstances of the instant case since this action, like the Massie case, is not one "involving a naked question of title". In the case at bar the plaintiffs seek to hold defendant liable for an accounting as a majority stockholder occupying a fiduciary relationship to plaintiffs as minority stockholders. This Court is of the opinion that the observation of Chief
341 Justice Marshall in the Massie case is applicable to the present situation, namely, "the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends does not seem sufficient to arrest that jurisdiction". Thus the action being grounded in breach of trust and transitory in character is maintainable wherever jurisdiction can be established over the defendant.

The portion of defendant's motion which seeks dismissal on the ground of plaintiffs' failure to join an indispensable party, namely, Northern Pacific Railroad Company, is not sustainable in view of the character of the action brought by plaintiffs as shown by the allegations of the petition and the relief prayed therein. The suit is brought against Northern Pacific Railway Company as trustee. It is not directed against the old company which defendant con-

tends should be made a party. Its purpose is to hold the Northern Pacific Railway Company as trustee for the plaintiffs for the property which it has received. The rule announced by the Supreme Court of the United States in Southern Pacific v. Bogert, 250 U.S. 483 (1919) appears to be peculiarly applicable. In that case the circumstances were that the Southern Pacific had foreclosed a mortgage on the property of the Houston and Texas Central Railway Company in 1888 and said property was acquired by the Houston and Texas Central Railroad Company. Bonds of the old company were exchanged for those of the new and all the stock in the new company was issued to Southern Pacific. The minority stockholders of the old company received nothing and in 1913 said minority stockholders of the old company brought suit in the State Court in New York praying that Southern Pacific be declared trustee for them of stock in the new company and prayed further for an accounting. The suit was removed to the Fed-
342 eral Court, Eastern District of New York. Plaintiffs prevailed in the trial court and on appeal in the Circuit Court of Appeals. The Supreme Court affirmed, remanding the case to the District Court for the purpose of accounting. In the opinion in the case in 250 U. S. 485, the Court stated, at page 485:

"In considering the many objections urged against the decree, it is important to bear constantly in mind the exact nature of the equity invoked by the bill and recognized by the lower courts. The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right by declaring the trust on which Southern

Pacific holds it and ordering distribution or compensation. The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation of the fruits of the sale."

At page 487 the Court said further:

"The Southern Pacific also urges that the suit must fail because the old Houston Company is an indispensable party and has not been joined. The contention proceeds upon a misconception of the nature of the suit. Since its purpose is merely to hold the Southern Pacific as trustee for the plaintiffs individually of the property which it has received, the old Houston Company is in no way interested and would not be even a proper party."

Defendant asserts that plaintiffs are not seeking the same remedy as was afforded by the Bogert case, supra; that in the Bogert case the plaintiffs affirmed and
343 ratified the foreclosure sales, whereas in the instant case the minority stockholders have repudiated all elements of the reorganization of Northern Pacific Railroad; that in the Bogert case the reorganization plan was attacked as unfair and inequitable and recovery was sought of the minority holder's fair share in the proceeds of the sale, whereas here plaintiffs seek to set aside the court decrees as void. Accepting arguendo, such interpretation of the Bogert case, it would not appear that the variations would render inapplicable the use of the rule expressed therein. In that case it had been contended that the rule holding majority stockholders to a fiduciary relationship toward the minority holders should not be applied because Southern Pacific was not a direct stock-

holder but exerted its control through a subsidiary. Commenting on this contention the Court stated:

"But the doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustee for the minority does not rest upon such technical distinctions. It is the fact of control, of the common property held and exercised, not the particular means by which or manner in which the control is exercised that creates the fiduciary obligation. * * * The essential of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company stockholders."

It would appear that the relief sought by plaintiffs in the instant case is essentially similar to that sought in the Bogert case and that the rule announced in the Bogert case should, a fortiori, apply herein, since in this case plaintiffs, or their predecessors, have always persisted in
344 the claim that the reorganization was invalid and that the transfer of assets to the majority stockholders was illegal, whereas in the Bogert case the minority holders had for a time acquiesced in the reorganization plan.

As the basis for its motion to quash service, defendant argues that the corporation does not come within the rule of "doing business" so as to make it amenable to service here in the District of Columbia. Theirs, it is argued, is merely a matter of solicitation. Plaintiffs argue that defendant comes within the rule of "solicitation plus" and thus may be served in personam.

This question of the amenability to service in personam of a foreign corporation in a forum distant from its state of incorporation, does not lend itself to a general rule.

Rather the facts of each individual case must be their own criteria. However, two general principles appear to have evolved. One is that solicitation in and of itself does not render a foreign corporation subject to suit, Green v. Chicago, B. & Q. R. Co., 205 U.S. 530 (1918). The other is that solicitation "plus" some other activity does subject the foreign corporation to liability to suit. International Shoe Co. v. Washington, 326 U. S. 310 (1945). And the doctrine is generally accepted that "very little more than 'mere solicitation' is required * * *". Frene v. Louisville Cement Co., 77 A.D.C. 133 (1943). Thus a determination on this question can only be reached by analyzing any and all activities which the foreign corporation may carry on in this forum.

The defendant corporation, organized and existing under the laws of Wisconsin with its main office in St. Paul, Minnesota, has been present here in the District of
345 Columbia since 1940. It conducts an office in the Shoreham Building and employs four persons known as "district passenger agent, district freight agent, general agent and a combination 'stenographer and chief clerk'." The office is organized into two departments, viz the freight and the passenger departments. The business which the defendant carries on is undoubtedly solicitation. However, defendant goes further than this. It also sells tickets for travel on defendant's line only, and in the calendar year of 1950 it sold 24 such tickets. It also sells "railroad pre-paid orders" and in the calendar year 1950 it sold 8 of these. There is nothing in the record to indicate that such total sales were as the result of any limitation. There is no reason suggested as to why the defendant would not have been able to sell more than such totals were it to have sufficient customers to whom such sales may have been made. The money from the sales of such tickets and orders is deposited in a local bank.

In addition to the "solicitation plus rule" more recent cases have demonstrated a tendency to place the solution of the question more upon a recognition of whether or not

the foreign corporation, enjoying the benefits of a local jurisdiction, may deny its subjection to such jurisdiction when it itself is the object of suit. In International Shoe case, supra, it was said:

"* * * to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and so far as these obligations arise out of or are connected with the activities within the state, a procedure which required the corporation to respond to a suit brought to enforce them, can in most instances, hardly be said to be undue".

346 In this connection see Western Smelting & Refining Co. v. P. R. R. Co., 81 F. Supp. 494 (D.C. Neb., 1948) and State of Md. for use of Chrysler v. Eastern Air Lines, 81 F. Supp. 345 (D.C.D.C. 1948).

It would appear, therefore, that the defendant company is enjoying the fruits of the local jurisdiction. And as such either under the "solicitation plus" theory or the more liberal doctrine as announced in the International Shoe case, supra, it is amenable to process in the District of Columbia.

Defendant further contends that the motion to dismiss should be granted on the principle of forum non conveniens. The difficulties attendant upon presentation of the defense as relied upon by counsel in its affidavits and arguments do not in the Court's opinion justify granting of the motion on the ground assigned. See Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508 (1947).

It is the opinion of this Court, therefore, that the motion to dismiss based upon the three foregoing grounds should be overruled. Counsel for Plaintiffs will prepare appropriate Order.

/s/ CHARLES J. McLAUGHLIN
*Judge*

March 9, 1951.

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**Opinion of Tamm, J., in Landell, et al. v. Northern Pac. Ry. Co., United States District Court for the District of Columbia, June 23, 1954 (122 F. Supp. 253).**

The issues of this case reach back over a period of ninety years to the time when Congress sought the expansion of the West by encouraging settlers and railroads through the inducement of free land which, at that time, must have seemed limitless. In this pioneer setting, on July 2, 1864, Congress created a Federal corporation, the Northern Pacific Railroad Company (hereafter referred to as the Railroad).[1] Financial difficulties eventually caused the appointment of receivers in 1893, and in 1896, pursuant to a reorganization plan and foreclosure proceedings under consent decrees in the Circuit Court of the United States for the Eastern District of Wisconsin, the Northern Pacific Railway Company (hereafter referred to as the Railway), a Wisconsin corporation, acquired the Railroad with its land grants and other properties, and has since operated the road and has obtained patents for millions of acres under the land grants. Successors in interest to non-assenting minority stockholders of the Federal corporation under the reorganization bring this suit against the Railway to set aside the decrees and orders of the Circuit Court of the United States for the Eastern District of Wisconsin, to declare title to the Railroad, franchises, and all other properties of the Railroad to be still
1256 in the Railroad, and to have the Railway account to the Railroad for all properties and profits received during the past half century. Plaintiffs' allegations are substantially that the defendant became the legal successor to the Railroad by a fraud upon the Wisconsin court, that defendant has maintained this position by the misuse of judicial process, that the Wisconsin court exceeded its authority in approving conditions in the consent decrees which were in violation of the statute creating the Federal corporation, and that the proceedings were also void in that the United States was not made a party thereto.

[1] 13 Stat. 365.

Defendant Railway has moved for summary judgment on the grounds that the action is barred by the statute of limitations and by laches. Consideration of this motion requires a review of the events preceding the filing of the present action on December 20, 1950.

After refusing to join in the reorganization of 1896, the dissenting stockholders, by written agreement in 1898, formed a committee to protect their rights and interests. Over the years, counsel for the committee and its members have been actively protesting possession by the Railway at stockholders' meetings of the Railway, to the Department of the Interior, the Interstate Commerce Commission, Attorneys General, and have agitated for Congressional investigation.

On the legal side, three suits are of special interest in consideration of the present motion. The first of these was brought in 1900 in the United States District Court for the Southern District of New York by Joseph Hoover "on behalf of himself and of such other stockholders of the Northern Pacific Railroad Company as may inter-
1257 vene and become parties hereto."[2] The action was against the Railway and others involved in the 1896 reorganization and in substance attacked these proceedings on many of the same grounds alleged by the present plaintiffs. After numerous periods of inactivity, the Hoover case was dismissed for lack of prosecution and a motion to restore it to the calendar was denied for inexcusable laches by Judge Hulburt on March 15, 1939.[3] Neither the Committee of the minority stockholders nor any of its members individually at any time attempted to participate officially in this suit, although they followed the proceedings, and counsel for Hoover was also counsel for the committee. Subsequent to dismissal of the suit, it was learned that Hoover, instead of being a bona fide non-assenting shareholder, had actually participated in the

[2] Deposition of Plaintiff Robert W. Lishman, p. 22, Exhibit 9, p. 3.

[3] Unreported Opinion. See Lishman deposition, Exhibit 123.

reorganization, voting some of his stock in favor of the reorganization.

The second suit, United States v. Northern Pacific Railway Co., 311 U. S. 317, is also known as the Land Grant Case. In 1924, President Coolidge and the Secretaries of Agriculture and Interior asked Congress to investigate the land grants to the Northern Pacific Railway Company. After a five-year study, a joint committee of Congress recommended that the Attorney General be authorized to institute an action to obtain "a final and complete determination of the respective rights of the United States and the Northern Pacific Railway Company to the end that the grants shall be finally adjusted and the interests of the United States and the grantee shall be fully protected."[4] Congress approved the recommendation[5] and suit was begun by the Attorney General in 1930. The 1258 District Court referred the case to a Special Master who made one report in 1933 and another in 1937. After the second report in 1937, minority stockholders of the Railroad attempted to intervene. The motion was denied as coming too late in the progress of the litigation. Schmidt et al. v. U. S., 102 F. 2d 589. Upon remand of U. S. v. Northern Pacific Railway Co. by the Supreme Court to the District Court for further proceedings, a second petition by the minority stockholders for leave to intervene was made and denied. 41 F. Supp. 273.

The third suit is the present one, the first suit initiated by the committee since its formation in 1898. From the briefs filed and the oral arguments for and against granting the motion for summary judgment, three questions are posed: (1) Does the statute of limitations apply as a bar to this action; (2) Is this the kind of situation to which the doctrine of laches can be applied; and if so, (3) Do the facts in this case warrant such application.

Since the Court, for the reasons set forth below, finds that the plaintiffs are barred by laches, it is not necessary

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[4] S. Rep. No. 5, 71st Cong. 1st Sess.

[5] 46 Stat. 41.

to pass on defendant's contention that this suit falls within the concurrent jurisdiction of law and equity and therefore the statute of limitations must be applied.

Plaintiffs maintain that the doctrine of laches cannot apply to a case like the present one in which it is alleged that (1) an act done is in violation of a statute, and in which this violation still continues today; (2) in which a court acts beyond its powers; and (3) in which a decree is procured by a fraud upon the court. Plaintiffs
1259 make the plausible argument that a transaction which is fraudulent and illegal in its inception cannot be made legitimate and lawful by the passage of time. This is a basically sound argument. Does it not follow, however, that persons injured by an allegedly fraudulent transaction must exercise their legal rights within some reasonable period of time, at least within the lifetime of some party or witness to the original transaction? It is this Court's view that although time may not make legal that which is illegally conceived, time may bar the capacity of allegedly injured persons to complain of the transaction. Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, 349.

The Court is asked to accept as an equitable proposition the idea that a suit is never barred where the above enumerated conditions exist. As Mr. Justice Story remarked: "It is for the public interest and policy to make an end to litigation, or as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal." Ocean Insurance Co. v. Fields, 2 Story, 59; 18 Fed. Cas. 532. Present plaintiffs are asking the aid of equity against an alleged wrongdoer but deny that the principles of equity may be evoked as against themselves. It has long been settled that the public interest, intervening equities of third parties and the rule of "clean hands" may all operate to raise the bar of laches. Vigilantibus non dormientibus aequitas subvenit. "If the complainant may put forward these excuses for delay after thirty

years, there is no reason why they may not allege the same as an excuse after the lapse of sixty. The truth is, there must be some limit of time within which these
1260 excuses shall be available, or titles might forever be insecure. The interests of public order and tranquility demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable." Wetzel v. Minnesota Railway Transfer Co., 169 U. S. 237, 241.

On the final point, whether laches applies under the facts of this case, the Court finds against the plaintiffs for the following reasons:

Plaintiffs assert that there has been no lack of diligence since for more than fifty years they have continuously sought administrative and legislative relief. In other words, they raise the novel point that an injured party can avoid laches by seeking remedies other than legal. Under limitations, a plaintiff may safely resort to peaceful settlement of his claims (Shaffer v. Rector Well Equipment Co., 155 F. 2d 344), or pursue an administrative remedy provided for by statute (Order of Railroad Telegraphers v. Railway Express Agency, supra). But this right is not perpetual. If it is in the public interest that there be an end to litigation, certainly it cannot be held that diligence can be handed down successfully from one generation to another. This is literally true in the present case since not one of the original dissenting stockholders is alive today, nor are any of the original parties who participated in the reorganization of 1896, nor even any of the original counsel for the Railway or the protective committee.[6]
1261 It thus appears that no party, attorney or witness to the 1896 proceedings is alive today to affirm or deny these ancient charges. As the Court said in Abraham

[6] Unreported opinion of Judge Hulburt in the Hoover case, supra; affidavit of Hugh McLeod, Assistant Secretary of Northern Pacific Railway Co. and affidavit of R. Gordon Wasson, Vice President of J. P. Morgan & Co., Inc., exhibits A and B respectively of defendant's motion for summary judgment.

v. Ordway, 158 U. S. 416, 421: "Length of time necessarily obscures all human evidence and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor."

No matter how plaintiffs sought relief in the past, what they sought then and seek now is a declaration of their legal rights, and ultimately legal rights must be determined in a judicial proceeding. Even "the mere institution of a suit does not of itself relieve a person from the charge of laches, and [that] if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun." Johnson v. Standard Mining Co., 148 U. S. 360, 370. "[T]he mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded." Mackall v. Casilear, 137 U. S. 556, 567.

The fact is that plaintiffs deliberately and under the advice of competent counsel[7] chose their course for over fifty years. The written agreement of 1897 creating the protective committee authorized the committee "to institute and conduct all such proceedings at law or in equity" necessary to protect and assert the rights
1262 of the minority stockholders.[8] Represented by able counsel, these stockholders and their heirs have attempted unsuccessfully for over half a century to persuade others to fight the legal battle, and finally, under circumstances not shown to differ materially from the situation through the years, they have decided to ask for

[7] Counsel for the committee included Joseph P. McCullen, member of the bar of Philadelphia and later judge of one of the municipal courts of Philadelphia; and John G. Johnson, outstanding member of the Philadelphia bar.

[8] Lishman deposition, p. 8, exhibit 1. See also to the same effect the revised agreement of 1906, Schedule A of the complaint.

a legal determination of their legal rights by a legal tribunal.

It would seem that long ago plaintiffs should have been cautioned by the unproductive results of their protests to the non-judicial branches of the government. In 1897, during the term of President McKinley, counsel for the committee appealed to the Secretary of the Interior, and the matter was referred to the Attorney General who held the claims were unfounded. 21 Opinions of the Attorney General 486. In 1904, during the administration of President Theodore Roosevelt, another appeal was made to the Secretary of the Interior. It was again referred to the Attorney General and again was rejected by him. 25 Opinions of the Attorney General 401. Thus, twice, executive officers with the responsibility of guarding the public interest put plaintiffs on notice that no support would be forthcoming from that branch of the government.

The committee fared no better in its attempts to institute Congressional investigation, although plaintiffs allege that they were responsible for the United States' bringing suit in the Land Grant case. Even if we assume the truth of this allegation, plaintiffs are faced with the finding of laches in their attempts to intervene in that suit. As the Court states in its opinion, Schmidt v. U. S., supra, pp. 595-6:

1263 "The appellants account for their delay in presenting their petition for leave to intervene on the ground that they assumed that all the issues stated in the act of June 25, 1929, would be presented and tried in the case, but that when they ascertained that all these issues had not been passed upon and the Court was moving toward a final decree without such determination of all these issues, they sought to intervene. This contention is inconsistent with the claim that the minority stockholders of the Railroad Company had been exercising the greatest possible diligence since 1875, and particularly since 1896, to establish their rights and that the act of June 25, 1929,

resulted from their persistence * * *. Having, as they claim, so far succeeded in their efforts they then remained dormant for nearly seven years after the Attorney General had filed a complaint in this action in which it was alleged that the Railway Company was the successor in interest to the Railroad Company which allegation was admitted by both companies. The admission by the Railroad Company was made more than five years before the appellants attempted to intervene."

Nor can plaintiffs assert that the defendant has ever indicated anything but opposition to their claims. This opposition was noticed as far back as 1902 by a resolution passed at the anual meeting of the majority stockholders.[9] This opposition has continued unabated through the years as indicated by repeated actions at annual stockholders' meetings. The Railway's answer in the Hoover suit was again notice to plaintiffs that the defendant denied these alleged rights and would resist them in court. Railway's unwavering opposition was a plain indication that it would not yield to anything less than adverse court action. Norris v. Haggin, 136 U. S. 386.

The fact, as plaintiffs aver, that their counsel advised administrative and legislative instead of judicial action is a fact which militates against them. Faulty judgment of counsel is certainly no defense against the charge of laches. Nor is the argument that these non-legal methods were far less costly than court action. "His 1264 [plaintiff's] poverty or pecuniary embarrassment was not sufficient excuse for postponing the assertion of his rights." Hayward v. National Bank, 96 U.S. 611, 618. See also Leggett v. Standard Oil Co., 149 U. S. 287;

[9] Lishman deposition, exhibit 26: "RESOLVED: That the stockholders of the Northern Pacific Railroad Company expressly dissent from any action pretending to be taken in the name of or on behalf of the stockholders of this Company in anywise bringing in question in Congress or in any State of the United States the validity and completeness of such foreclosure proceedings or the title of the Northern Pacific Company to its railroad land grant and property formerly of this Company, and declares any statements or action questioning the same as unwarranted and unfounded in law and in fact."

Levis v. Kengla, 8 U. S. App. D. C. 230; 19 Am. Jur. sec. 503.

Another argument advanced is that the defendant has prevented full knowledge and disclosure of the fraud by refusing to make its records available to the minority stockholders. However, plaintiffs have made no convincing showing that the alleged fraud lies more fully exposed today than it was in 1896, or at the latest, in 1900, when the Hoover suit was filed. Certainly the processes of court were available to compel access to defendant's records, and all the other records were matters of public record. Contrarily, plaintiffs assert that nothing more is necessary to prove their claims than the records now before the Court. If this is true, then from the public records and from the defendant's own records, accessible through court process, plaintiffs could long ago have revealed the alleged fraud in its entirety. If more was necessary, then of necessity plaintiffs' proof must include the testimony of witnesses no longer alive. "[To] avoid the lapse of time or statute of limitations, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of these principles can apply to the defendants in this case. The acts which constituted the fraud as alleged in the bill were open and public acts. The note and the mortgage were recorded in the proper public office of the proper county. The possession of defendants was obtained by judicial proceedings which were
open to everybody's examination, and which were
1265 probably well known in the entire community."
Norris v. Haggin, supra, p. 392.

On the issue of fraud, plaintiffs are also confronted with a statement made by their late counsel in a letter of March 29, 1916:

"That a great wrong has been done them [minority stockholders] has always been believed in, but discovery of the breach of trust and of the perfidy of the fraud per-

petrated against them was not had until now, the facts having been most skillfully concealed from government officials, from the Court and from the public.'"[10]

It is difficult to understand plaintiffs' excuse that their delay was in part due to the problem they faced of persuading a court to set aside the decrees of 1896 which the defendant fraudulently fortified with the erroneous opinions of the two Attorneys General and judicial dicta. Plaintiffs' problem is no different today except that the array against them is much greater. Plaintiffs themselves were responsible for the opinions of the Attorneys General, and much of the other matter complained of resulted from their refusal to submit their claims to the courts. Their confidence in the courts comes only after fifty-four unsuccessful years elsewhere. This Court finds no substantial grounds for such neglect.

Before the Court also are the vast changes in the financial and physical structures of the Railway over the past fifty-four years. Its mileage has increased nearly 50%; property values have increased from approximately $300,000,000 to about $820,000,000; lines and equipment of other railroads have been acquired; stock and bond
1266 issues have been sold to the public on numerous occasions.[11] Granting the relief prayed for by the plaintiffs would create a concentric chaos affecting the rights and equities of thousands of stockholders and creditors, most of which were not even in existence at the time of the alleged fraud.[12] Where a plaintiff has been

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[10] Letter from Joseph P. McCullen, counsel for the committee, to Francis Lynde Stetson, attorney for the defendant Railway. Lishman deposition, p. 180, exhibit 100.

[11] Affidavit of John J. Leahy, statistician of Northern Pacific Railway Co., exhibit C of defendant's motion for summary judgment.

[12] The affidavit of Hugh McLeod, supra, Assistant Secretary of defendant, states the following comparison of common stockholders in the years 1896 and 1951: in 1896 there were 2800 stockholders holding 800,000 shares of common stock, while in 1951 there were 20,914 stockholders: Of the 20,914 stockholders in 1951, only two individuals and 31 firms were also stockholders in 1896. The two individuals held 7 shares in 1896 and 9 shares in 1951; the 31 firms held 34,638 shares in 1896 and 86,066 shares in 1951. These 31 firms are brokers and security dealers and are and have been at all times engaged in buying and selling securities for customers.

acquiescent while defendant has made great changes and expenditures of money, courts of equity have always refused to give relief. Hays v. Port of Seattle, et al., 251 U. S. 233; Patterson v. Hewitt, 195 U. S. 309.

Plaintiffs' counsel have presented a variety of additional arguments in opposition to the defendant's motion for summary judgment, supported by many citations which these counsel contend uphold their position. The Court has carefully considered the points thus raised and the cases cited. In the interest of brevity, the Court refrains from detailed discussion of these points, observing that it can find no ultimate support of plaintiffs' position due primarily and basically to substantial differences of facts between the present case and the cited cases.

Despite plaintiffs' strong appeal to equity, in consideration of the defendant's greatly changed position and
1267 the equities of innocent intervening parties, this Court must find that the alleged rights of the minority stockholders are buried in the grave created by their inexcusable lack of diligence in not sooner asserting these claims in the courts. Defendant's motion for summary judgment is granted.

The Court commends counsel on both sides for their able presentations and careful research which were of great help to the Court. Prevailing counsel will present the necessary order granting the motion for summary judgment.

EDWARD A. TAMM
*Judge*

Dated: June 23rd, 1954

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**Opinion, per curiam, in Landell, et al. v. Northern Pac. Ry. Co., United States Court of Appeals for the District of Columbia Circuit, April 14, 1955.**

Appellants, acting as a committee of minority stockholders of the Northern Pacific Railroad Company, a federal corporation organized and existing under an act

of Congress of July 2, 1864,[1] brought this civil action. The gravamen of the complaint was that a reorganization of the railroad in 1896 was illegal. Appellants said they had protested the reorganization continuously since that date. However that may be, they did not seek judicial remedy until they brought the present action in 1950.[2] In the District Court Judge Tamm, with a careful and exhaustive opinion,[3] concluded that the action was barred by *laches*. We agree and have nothing to add to his discussion of the matter.

*Affirmed.*

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[1] 13 Stat. 365.

[2] A suit was brought in the Southern District of New York in 1900 by one Hoover, not of appellants' committee. It was allowed to die for want of prosecution in 1939, and a motion to reinstate it was denied for inexcusable *laches*.

[3] Landell v. Northern Pac. Ry. Co., 122 F. Supp. 253 (D.C. D.C. 1954).

## APPENDIX B

### Statutes and Rule Involved

#### Act of July 2, 1864 (13 Stat. 365)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That Richard D. Rice, John A. Poore, Samuel P. Strickland, Samuel C. Fessenden, Charles P. Kimball, Augustine Haines, Edwin R. W. Wiggin, Anson P. Morrill, Samuel J. Anderson, of Maine; Willard Sears, I. S. Withington, Josiah Perham, James M. Becket, A. W. Banfield, Abiel Abbott, John Newell, Austin L. Rogers, Nathaniel Greene, jnr., Oliver Frost, John A. Bass, John O. Bresbrey, George Shiverick, Edward Tyler, Filander J. Forristall, Ivory H. Pope, of Massachusetts; George Opdyke, Fairly Holmes, John Huggins, Philander Reed, George Briggs, Chauncy Vibbard, John C. Fremont, of New York; Ephraim Marsh, John P. Jackson, jr., of New Jersey; S. M. Felton, John Toy, O. J. Dickey, B. F. Archer, G. W. Cass, J. Edgar Thompson, John A. Green, of Pennsylvania; T. M. Allyn, Moses W. Wilson, Horace Whittaker, Ira Bliss, of Connecticut; Joseph A. Gilmore, Onslow Stearns, E. P. Emerson, Frederick Smyth, William E. Chandler, of New Hampshire; Cyrus Aldrich, H. M. Rice, John McKusick, H. C. Waite, Stephen Miller, of Minnesota; E. A. Chapin, John Gregory Smith, George Merrill, of Vermont; James Y. Smith, William S. Slater, Isaac H. Southwick, Earl P. Mason, of Rhode Island; Seth Fuller, William Kellogg, U. S. Grant, William B. Ogden, William G. Greene, Leonard Sweat, Henry W. Blodgett, Porter Sheldon, of Illinois; J. M. Winchell, Elsworth Cheesebrough, James S. Emery, of Kansas; Richard F. Perkins, Richard Chenery, Samuel Brannan, George Rowland, Henry Platt, of California; William F. Mercer, James W. Brownley, of Virginia; John H. B. Latrobe, W. Prescott Smith, of Maryland; Greenbury Slack, A. J. Boreman, of West Virginia; Thomas E. Bramlette, Frank Shorin, of Kentucky; John Brough, John A. Bingham,

Oran Follett, John Gardner, S. S. L'Hommedieu, Harrison G. Blake, Philo Chamberlin, of Ohio; John A. Duncan, Samuel M. Harrington, of Delaware; Thomas A. Morris, Jesse L. Williams, of Indiana; Samuel L. Case, Henry L. Hall, David H. Jerome, Thomas D. Gilbert, C. A. Trowbridge, of Michigan; Edward H. Broadhead, Alexander Mitchell, Benjamin Ferguson, Levi Sterling, — Marshall, of Wisconsin; J. C. Ainsworth, Orlando Humason, H. W. Corbett, Henry Failling, of Oregon; J. B. S. Todd, M. K. Armstrong, J. Shaw Gregory, J. Le Berge, of Dakota Territory; John Mullan, Anson G. Henry, S. D. Smith, Charles Terry, of Washington Territory; H. W. Starr, Platt Smith, Nixon Denton, William Leighton, B. F. Allen, Reuben Noble, John L. Davies, of Iowa; Willard P. Hall, George R. Smith, H. Gayle King, John C. Sargeant, of Missouri; William H. Wallace, of Idaho Territory; J. H. Lathrop, Henry D. Cooke, H. E. Merrick, of the District of Columbia, and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Northern Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk-line at the most suitable place, not more than three hundred

miles from its western terminus; and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the board of commissioners of the "Northern Pacific Railroad Company," and fifteen shall constitu[t]e a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Melodion hall, in the city of Boston, at such time as any five commissioners herein named from Massachusetts shall appoint, not more than three months after the passage of this act, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Philadelphia, Cincinnati, Milwaukee, and Chicago, once a week at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said board shall in like manner call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times, and in such principal cities or other places in the United States, as they, or a quorum of them, shall determine, within six months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all sub-

scriptions, and to receipt therefor. So soon as twenty thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each state in which subscription books have been opened, at least fifteen days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect by ballot thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board, shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners, treasurer, and secretary, shall then deliver over to said directors all the properties, subscription books, and other books in their possession, and thereupon the duties of said commissioners, and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen) and for the transaction of business shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company", its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material

of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate

sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road;

and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *Provided,* That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided, also,* That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

SEC. 5. *And be it further enacted,* That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: *Provided,* That the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any territory or state in which the same may be situated, to

form running connections with it, on fair and equitable terms.

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

SEC. 7. *And be it further enacted*, That the said "Northern Pacific Railroad Company" be, and is hereby, authorised and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or

premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed, upon application by either party, to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, femme covert, non compos, insane person, or persons residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may ap-

point a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in its discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than

fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July anno Domini eighteen hundred and seventy-six.

SEC. 9. *And be it further enacted,* That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. *And be it further enacted,* That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.

SEC. 11. *And be it further enacted,* That said Northern Pacific Railroad or any part thereof shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation.

SEC. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall

be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

SEC. 13. *And be it further enacted,* That the directors of said company shall make an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

SEC. 14. *And be it further enacted,* That the directors chosen in pursuance of the first section of this act shall, so soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The Secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

SEC. 15. *And be it further enacted,* That the president, vice-president, and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors,

of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. *And be it further enacted,* That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph line within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Philadelphia, and Chicago; and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

SEC. 17. *And be it further enacted,* That the said Company is authorized to accept to its own use any grant,

donation, loan, power, franchise, aid, or assistance which may be granted to, or conferred upon, said company by the congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use for the purpose aforesaid.

SEC. 18. *And be it further enacted,* That said Northern Pacific Railroad Company shall obtain the consent of the legislature of any state through which any portion of said railroad line may pass, previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature.

SEC. 19. *And be it further enacted,* That unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said company to the amount of two millions of dollars, with ten per centum paid within two years after the passage and approval of this act, it shall be null and void.

SEC. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.

APPROVED, July 2, 1864.

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**Joint Resolution of May 31, 1870. (16 Stat. 370)**

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided*,

that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided further,* That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

SEC. 2. *And be it further resolved,* That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.

APPROVED, May 31, 1870.

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**Proviso in the Act of July 1, 1898. 30 Stat. 597, 620**

*And provided, further,* That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful suc

cessor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, * * *.

**Section 4, Act of June 25, 1929, c. 41, 46 Stat. 41**

SEC. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.

**Revised Statutes of Wisconsin for the Year 1878, As Amended By Ch. 260, 1880, Ch. 268, 1882, and Ch. 293, 1883**

Section 1833. Any railroad corporation organized and existing under the laws of the territory or state of Wisconsin, or existing by consolidation of different railway companies under the laws of the territory or state of Wisconsin, and of any other territory or territories, state or states, may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the state, when their respective railroads can be lawfully connected and operated together, to constitute one continuous main line, with or without branches, upon such terms as may be agreed upon, and become one corporation by any name selected, which within this state shall possess all the powers, franchises and immunities, including the right of further consolidations with other corporations under this section, and be subject to all the liabilities and restrictions of this chapter, and such in addition, including land grants and exemptions of land from taxation as such corporations peculiarly possessed or were subject to at the time of consolidation or amalgamation by the laws then in force applicable to them or either of them. Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock in person or

by proxy, at either a regular annual meeting thereof or a special meeting called for that purpose, in the manner prescribed by section 1826, or by the consent in writing of such stockholders annexed to such articles; and a copy thereof, with a copy of the records of such approval, or such consent, and accompanied by lists of their stockholders, and the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals affixed of such corporations, shall be filed for record in the office of the secretary of state before any such consolidation shall have any validity or effect. Any such railroad corporation may lease or purchase, and take a conveyance or assignment of the railroad, franchises, immunities and all other property and appurtenances, and the stock or bonds thereof, of any other railroad corporation, or any portion thereof, within or without this state, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased will constitute branches or feeders of any road maintained and operated by such purchasing corporation. And any such railroad corporation may purchase and hold the stock or bonds of any railway company, to which it has furnished the money for the construction of its railway, or may purchase for the money so furnished, or for such other consideration as may be agreed upon between the companies by their respective boards of directors, and take a conveyance of the whole or any portion of the franchises of said corporation, and of the railway property and appurtenances thereof, and all acts, purchases, and conveyances heretofore made by any railway company of this state, which are authorized by this act, are hereby legalized, ratified and confirmed. But no railroad corporation shall consolidate with, or lease or purchase or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights or property thereof, which owns or controls a parallel and competing line, to be determined by jury.

**Rule 56. Summary Judgment.**

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not

in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

## APPENDIX C

**Excerpts From the Congressional Globe Reporting the Debates on the Resolution of May 31, 1870 (Page References Are to the Congressional Globe)**

At the commencement of the debate in the Senate on February 28, 1870, the Congressional Globe briefly described the Resolution. The relevant portion of this description reads as follows (p. 1584):

> "* * * The Senate, as in Committee of the Whole, proceeded to consider the joint resolution (S. J. Res. 121) authorizing the Northern Pacific Railroad Co. to issue its bonds for the construction of its road, and to secure the same by mortgage. It proposes to authorize the Northern Pacific Railroad Co. to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and as proof and notice of its legal execution and effectual delivery, *the mortgage is* to be filed and recorded in the office of the Secretary of the Interior; and when so filed *is* to be deemed to be a good and sufficient conveyance of all the rights and property of the company as therein expressed; * * *." (Emphasis supplied.)

On April 7, 1870, the Chairman of the Senate Committee on the Pacific Railroad, Senator Howard, said in the course of debate (pp. 2492, 2493-4):

> "The company are now anxious to issue their mortgage bonds for the purpose of raising money to complete this road. The value of those bonds will depend upon the value of the lands on which they rest, and upon the value of the line of road and the franchise, which will also be included in *the mortgage*. Capitalists who lend money are very apt to look sharply into the nature of the securities which are tendered to

them for the repayment of the money. A capitalist understands perfectly well what is meant by a donation of alternate sections of land to a railroad company. He knows that the title of the United States is granted to the company, and that *the mortgage* upon which he lends money *is* upheld and supported by that title in fee-simple to the lands granted. He knows that when he or his trustee forecloses *the mortgage* under which he lends the money the sale of the lands will be also in fee-simple, and that the amount of money to be obtained upon a mortgage sale will be greater as the title which is given to the purchaser is clearer and stronger.

* * * *

"What I said was this: That if these lands, which are to be sold at a maximum of $2.50, found their way into *the mortgage,* that would be a circumstance to affect the character of *the mortgage* and the credit of *the mortgage,* and of course it would be some slight embarrassment in the negotiation of the mortgage bonds; because it will be impairing the value of the land so far forth to reduce the price if the market price of the land was higher than $2.50." (Emphasis supplied.)

On April 9, 1870, Senator Howard said (p. 2545):

"Speaking of the mortgage which it is contemplated to issue, the resolution says:

"'And as proof and notice of its legal execution and effectual delivery, *said mortgage* shall be filed and recorded in the office of the Secretary of the Interior, and when so filed, shall be deemed to be a good and sufficient conveyance of all the rights and property of said company as therein expressed'.

"He intimated on Thursday that it would be a strictly legal construction of this statute if the company should include in its mortgage lands which should lie entirely

without the range of the alternate sections, lands that might lie anywhere and everywhere, provided they belong to the United States, and that such lands would be subject to the operation of *this mortgage*. Do I misstate the Senator?" (Emphasis supplied.)

On April 20, 1870, Senator Howard said (p. 2845):

"It is easy to see that this amendment would have a very injurious effect on *the mortgage* which it is proposed to execute on these lands." (Emphasis supplied.)

Senator Thurman, a leading opponent of the legislation, understood the Joint Resolution in the same way. In discussing the proposal in the Senate on April 11, 1870, he said (p. 2570):

"Now, sir, what is it that they ask? They ask that Congress shall authorize them to make *a mortgage*, not simply upon the road, but upon every dollar's worth of property, real, personal, or mixed, that they own; and not only that, but upon their corporate franchises and franchise of being a corporation. If that mortgage is given—*a mortgage* given before there is one single shovelful of earth dug out, before there is anything done whatever; *a mortgage* put upon this road without any limitation whatsoever as to the price for which the bonds may sell—what, I ask, will be the ultimate fate of the road under such *a mortgage—a mortgage* unlimited in amount under which $200,000,000 of bonds may be put upon the market without any limitation whatsoever as to the price for which they shall sell or the interest which they shall bear? Does not any man who has the least experience in the history of railroads in this country know that there can be but one outcome to *such a mortgage* as that, and that is the sale of all this property under *that mortgage* and its purchase by a ring

in the company itself? That is the common history of railroads—the sale of everything under *this mortgage* and a purchase by a ring among the stockholders themselves. That is to be the long and the short of it.

"After the profits that shall have resulted from manipulating the bonds, after the commission that shall have been paid to some banker or broker, perhaps an interested individual in the concern, after he shall have squeezed the orange and got all he can get out of it, in the end the whole thing will go to sale under *the mortgage*, and all the property belonging to this company and given to it by the Government will become the property of a ring in the corporation itself, and freed from its liabilities because sold under the prior lien of *the mortgage*. Then those who are creditors to that company, then those to whom it has become indebted, may whistle for their pay. This ring will have the road and all its property under the prior lien of *the mortgage*, and the stockholders who are not in the ring and the creditors who are not secured by the mortgage may whistle for their pay." (Emphasis supplied.)

Senator Pomeroy, another opponent, understood it similarly. On the same occasion he said (p. 2577):

"If you mortgage a lot of land it is liable to slip away into the hands of the settlers from time to time, so that when that security comes to be applied for there is no land there, then you have no security; and on that account I say that for *this mortgage which is authorized* the land should be secured beyond a peradventure of diminution, so that the number of acres existing and due the company at the time *the mortgage is put on* can not be diminished." (Emphasis supplied.)

At the commencement of the debate in the House on May 5, 1870, the Congressional Globe described the Resolution as follows (p. 3263):

> "It authorizes the Northern Pacific Railroad Co. to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and provides that, as proof and notice of its legal execution and effectual delivery, *said mortgage* shall be filed and recorded in the office of the Secretary of the Interior." (Emphasis supplied.)

Congressman Wheeler, Chairman of the House Committee on the Pacific Railroad, in orally reporting the Resolution to the House on that same day, said (p. 3263):

> "The company is not here today to ask for money or enlarged subsidies in lands. It seeks by this legislation three things.
>
> "First, it wants to put the national impress upon its *mortgage* by recording and filing *it* in the office of the Secretary of the Interior." (Emphasis supplied.)

On May 25, 1870, Congressman Wheeler said (p. 3793):

> "Another objection, upon which repeated changes have been rung, is as to *the mortgage* which this company is allowed to issue. Mr. Speaker, I take it we are not here to legislate brains into the heads of the money lenders of this or foreign countries. A man who knows enough to accumulate money is generally sharp enough to look out for his own security when he loans it. We are told here in a general way by gentlemen that this joint resolution permits this company to mortgage all this land. Sir, that is simply absurd. This joint resolution permits the company

to secure its bonds by *a mortgage* on 'its property and rights of property of all kinds and descriptions, real, personal, and mixed.' " (Emphasis supplied.)

Congressman Ela, an opponent of the legislation, understood the Resolution in this same way. On May 5, 1870, he said (p. 3268):

"I hope the House will not sustain the call for the previous question on this joint resolution without giving us an opportunity to look into it and see what is in it. Now, sir, what is this proposition. Why, sir, it is practically a proposition to enable this corporation to go into the money market of the world to borrow money with *a mortgage* upon 47,000,000 acres of land, in competition with the Government which has nothing but the public faith of the people to guaranty it in what it may want to borrow, and to be damaged by the chance of Democratic successes, if these plunder schemes are to be put through a Republican Congress." (Emphasis supplied.)

On May 25, 1870, Mr. Ela said (p. 3789):

"Why, Mr. Speaker, if this corporation can not build its road by the subscriptions to its stock, but has to mortgage its lands to the moneyed powers of Europe, and if the road has got to be built by *a mortgage* to those powers, I ask if it is not better that the United States Government shall mortgage its lands itself to build the road and own the road when completed, which is to be between seventeen and eighteen hundred miles long, instead of giving it to a corporation, without their having contributed a dollar from their own pockets to build it?" (Emphasis supplied.)